Supreme Court, U.S.
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No. 91-1866

In the Supreme Court of the United States

OCTOBER TERM, 1992

DANIEL WEISS, PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION AND THE STATE OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JOANNE T. MEDERO
General Counsel

JAY L. WITKIN
Deputy General Counsel

VICTOR L. REID
Attorney
Commodity Futures Trading Commission
Washington, D.C. 20581

QUESTION PRESENTED

Whether the courts below erred in finding that petitioner's imprisonment for civil contempt had not lost its coercive effect after petitioner's first three months of imprisonment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 950 F.2d 1525. The opinions and orders of the district court (Pet. App. B1-B7; C.A. Rec. 41-55) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1992. A petition for rehearing was denied on February 20, 1992. The petition for a writ of certiorari was filed on May 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, together with another individual and various corporations controlled by them—Wellington Precious Metals, Inc., Wellington International, Inc., and D. Weiss & Associates, Inc. (collectively Wellington)—conducted a so-called "Deposit Program" scheme pursuant to which they offered to the general public the opportunity to purchase specific amounts of precious metal (usually silver) at a price fixed when the contract was executed. Approximately 2,100 to 2,200 customers entered into these contracts; most, if not all, received little or no return on their investments. Gov't C.A. Br. 6. The Deposit Program was, in essence, a fraudulent "boiler room" operation, and petitioner siphoned off large sums of money from Wellington before the fraudulent scheme was uncovered. Pet. App. A1-A3.

On November 14, 1985, respondents brought suit against petitioner and others in the United States District Court for the Southern District of Florida, alleging that the defendants were engaging in the offer and sale of illegal off-exchange futures contracts in violation of Section 4(a) of the Commodity Exchange Act, 7 U.S.C. 6(a), and were defrauding the public in violation of Section 4b(A) of the Act, 7 U.S.C. 6b(A). Violations of Florida securities laws were also alleged. The complaint sought, *inter alia*, injunctive relief, a freeze of the defendants' assets, appointment of a receiver, and equitable relief in the form of disgorgement, rescission, and restitution. Gov't C.A. Br. 5-6.

2. On July 15, 1988, the district court ruled in favor of respondents. The court found that the Deposit Program contracts were illegal futures contracts in violation of Section 4(a) of the Act, and that petitioner and the other defendants had violated Section 4b(A) of

the Act in connection with the offering of Deposit Program contracts by conveying unrealistic profit predictions to customers, portraying the contracts as nearly risk free, and overstating Wellington's years in business. Petitioner was found culpable both in his individual capacity and as a principal of Wellington. Gov't C.A. Br. 6-7.

On October 21, 1988, the district court entered a final judgment which imposed a permanent injunction upon petitioner and the other defendants and ordered ancillary equitable relief, including appointment of a permanent receiver. Additionally, the court ordered petitioner to disgorge not less than $2,883,107 to the receiver within ten days. Pet. App. A2-A3; C.A. Rec. 18-24. Petitioner took no appeal from those rulings. Pet. App. A3.

3. Petitioner failed to satisfy the disgorgement order, and respondents asked that he be held in contempt. Pet. App. A3-A4. At the contempt hearing, petitioner conceded that he had failed to comply with the disgorgement order, but argued that his failure should be excused on the basis of financial inability. *Id.* at A4.

To support his claim that he no longer possessed any funds taken from Wellington (or any assets purchased with Wellington funds), petitioner testified that he had invested large sums in businesses that failed, loaned money that was not repaid, and purchased assets that he no longer owned. All told, however, petitioner's testimony accounted for only $1,347,000, less than half of the total amount ordered to be disgorged. Pet. App. A4-A8. The district court rejected petitioner's testimony, finding him in civil contempt for failure to comply with the disgorgement order. The court ordered him to pay over to the receiver five percent of the amount due under the

final judgment, or $144,155.35. *Id.* at A8; C.A. Rec. 48-51, 53-55. When petitioner failed to comply with that order, he was incarcerated on April 24, 1990. Pet. App. A9.

4. On June 11, 1990, petitioner filed a motion in the district court to terminate the contempt order. On July 20, 1990, approximately three months after petitioner was incarcerated, the court denied that motion. Pet. App. B1-B7. The court explained that petitioner's failure to comply with the disgorgement order after spending some time in prison did not necessarily prove that he would not comply in the future. Instead, the court found that "it is far more plausible under the circumstances of this case that [petitioner's] refusal to pay means simply that [petitioner] deems the detriments of incarceration outweighed by the concomitant benefits of holding onto his ill-gotten Wellington monies." *Id.* at B5. The court further stated that, "as the days slip by, [petitioner] will reassess the foregoing cost-benefit balance and determine that it would be in his best interests to come forward with the money and end his incarceration." *Ibid.* Accordingly, the court concluded that "the coercive sanction might yet produce its intended result." *Id.* at B5-B6 (quoting *Simkin* v. *United States*, 715 F.2d 34, 37 (2d Cir. 1983)).[1]

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[1] Petitioner has continued to pursue termination of the contempt order in proceedings beyond the scope of the orders for which review is sought in this Court. On August 20, 1991, he filed a second motion to terminate the order of civil contempt. The district court denied that motion on October 23, 1991. Petitioner then filed a notice of appeal of that order on November 19, 1991; that appeal is now pending before the Eleventh Circuit. Moreover, on January 10, 1992, petitioner renewed his August 1991 motion to terminate contempt with the district court. That motion was denied on July 6, 1992.

5. The court of appeals affirmed. Pet. App. A1-A16. The court upheld the district court's determination that the civil contempt order had not lost its coercive effect, agreeing that "[p]rison time, in and of itself, will not satisfy [petitioner's] burden of proving that there exists no 'realistic possibility' that he can comply with the court's contempt order." *Id.* at A14. Acknowledging that "each passing month of incarceration may strengthen [petitioner's] claim of inability," the court concluded that "many months or perhaps even several years may pass before it becomes necessary to conclude that incarceration will no longer serve the purpose of the civil contempt order." *Id.* at A14-A15. Accordingly, the court held that the district court had not abused its discretion in issuing its July 1990 order refusing to terminate petitioner's commitment for civil contempt.[2]

ARGUMENT

1. Petitioner principally contends (Pet. 12-22) that his continued commitment for contempt from April 1990 until the present[3] has ceased to be coercive and has instead become punitive in violation of his due process rights. To the extent petitioner complains of his confinement past July 1990, however, that issue is not properly before this Court. The court of appeals'

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[2] The court also rejected petitioner's contentions that he should have been permitted to relitigate the amount of money he actually received from Wellington and that the district court erred in holding him in contempt despite his purported inability to comply with the order. *Commodity Futures Trading Comm'n* v. *Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1528-1530 (11th Cir. 1992). Petitioner has not sought review of those rulings in this Court.

[3] Petitioner is also serving a concurrent state criminal sentence. Pet. 11.

decision embraces only the district court's March 14, 1990, order of civil contempt and its July 20, 1990, order denying petitioner's motion to terminate contempt, a period encompassing only the first three months of petitioner's incarceration.[4]

Accordingly, the only question properly presented in this petition is whether the court of appeals correctly affirmed the district court's July 1990 finding that petitioner's imprisonment for civil contempt had not lost its coercive effect after three months. The court of appeals' ruling on that question was clearly correct. The district court applied the proper legal standards and found as a matter of fact that further confinement was likely to " 'produce its intended result.' " Pet. App. B6. That factual finding, which was upheld by the court of appeals, does not merit further review. *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

2. Petitioner contends (Pet. 17-18), however, that the district court failed to make the requisite "individualized determination" that petitioner will comply with the disgorgement order if sanctions are continued. That assertion is without merit.

When confronted with a motion to terminate contempt, the trial court must make a "conscientious effort to determine whether there remains a realistic possibility that continued confinement might cause

[4] Still pending before the court of appeals is petitioner's appeal of the district court's subsequent order of October 23, 1991, denying petitioner's second motion to terminate contempt. Petitioner has not asked this Court to grant a writ of certiorari before judgment in that case, and in any event no showing has been made that the case "is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11; see 28 U.S.C. 2101(e).

the contemnor" to comply with the court's order. *Simkin* v. *United States*, 715 F.2d 34, 37 (2d Cir. 1983); see also *Maggio* v. *Zeitz*, 333 U.S. 56, 76 (1948). The contemnor, however, has the burden of showing that no such realistic possibility exists. *Simkin* v. *United States*, 715 F.2d at 37; see also *Lambert* v. *Montana*, 545 F.2d 87, 91 (9th Cir. 1976). If, after review of all the relevant evidence, the court is satisfied that the incarceration might yet produce compliance with the order, the confinement may continue. *Simkin*, 715 F.2d at 37. In this regard, a trial court has "virtually unreviewable discretion both as to the procedure [it] will use to reach [its] conclusion, and as to the merits of [its] conclusion." *Id.* at 38; see also *In re Grand Jury Proceedings (Howald)*, 877 F.2d 849, 850 (11th Cir. 1989).

The district court's July 1990 order clearly manifested the requisite "conscientious effort." At the time of the court's ruling, petitioner had been incarcerated for only three months. The district court had recently heard and then adjudged as incredible petitioner's testimony in the contempt hearing. In those circumstances, it was well within the court's discretion to conclude that petitioner's refusal to discharge his obligations meant that petitioner, at least for the moment, deemed the detriments of incarceration to be outweighed by the benefits of holding onto his ill-gotten gains. Similarly, it was reasonable for the court to predict that petitioner might still reassess his cost-benefit analysis at a later date and decide that it would be in his best interest to come forward with the money in order to end his incarceration. Pet. App. B5. The district court's fact-bound determination that continued incarceration was appropriate in the particular circumstances of this case does not merit review.

3. Finally, petitioner asserts (Pet. 22, 30) that this Court should resolve a "continued disagreement among the Circuits" as to "what factors need to be considered in deciding what to do about the fact that a period of imprisonment has thus far failed to induce compliance." Petitioner does not point to any actual disagreement among the circuits on that issue, however, and in reality there is no conflict concerning the proper application of this Court's decisions in *Maggio* v. *Zeitz*, *supra*, and *McNeil* v. *Director, Patuxent Institution*, 407 U.S. 245 (1972).[5]

Petitioner's fundamental contention appears to be that periods of confinement longer than some arbitrary benchmark should be "carefully scrutinized." Pet. 26. Petitioner cites no authority for that contention, nor does he explain what form the desired scrutiny should take. In any event, this Court's decisions already require judicial scrutiny of civil contempt orders in order to ensure compliance with due process standards. As this Court stated in *Maggio*, the contemnor cannot "be held in jail forever if he does not comply." 333 U.S. at 76; see also *United States ex rel. Thom* v. *Jenkins*, 760 F.2d 736, 740 (7th Cir. 1985) ("although incarceration for civil contempt

[5] Petitioner errs in suggesting (Pet. ix) that the decision below is somehow inconsistent with *Lambert* v. *Montana*, 545 F.2d 87 (9th Cir. 1976), and *In re Grand Jury Investigation (Braun)*, 600 F.2d 420 (3d Cir. 1979). Those cases stand merely for the proposition that "if and when it becomes manifest that continued imprisonment will not result in compliance, the confinement then becomes punitive in character and the contemnor must be released." *In re Grand Jury Investigation*, 600 F.2d at 425 n.14; see *Lambert* v. *Montana*, 545 F.2d at 90-91. That proposition was acknowledged and accepted by the courts below; petitioner simply failed to make the requisite showing that his confinement had become punitive. There is no conflict.

may continue indefinitely, it cannot last forever"). Review of a contemnor's incarceration at reasonable intervals or when requested by either party insures that the contemnor will not endure incarceration when it no longer serves its coercive purpose. *Ibid.* Petitioner is already receiving such regular review at reasonable intervals by the district court. See note 1, *supra*. Accordingly, no further review is warranted.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOANNE T. MEDERO
General Counsel

JAY L. WITKIN
Deputy General Counsel

VICTOR L. REID
Attorney
Commodity Futures Trading Commission

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[6] Petitioner further argues (Pet. 24) that had he been sentenced under the federal contempt statute, 18 U.S.C. 402, he would have been freed after six months. That argument fails to recognize the fundamental difference between civil and criminal contempt. The purpose of civil contempt is to coerce obedience to lawful orders, while criminal contempt is designed solely to punish acts of disrespect and vindicate the court's authority. *Maggio*, 333 U.S. at 67-68. A civil contemnor may purge himself of contempt and obtain release from jail by complying with the court's order; he "carr[ies] the key of his prison in his own pocket." *Id.* at 68. A criminal contemnor lacks such control over his imprisonment.